

**Administrative Tribunal**

Distr. Limited
31 January 2005
English
Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1198

Case No. 1087: MASSI
1088: MASSI
1142: MASSI

Against : Le Secretary General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Dayendra Sena Wijewardane;

Whereas, on 1 December 2002, Primo Massi, a former staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 16 April 2003, the Applicant again filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 June 2003, the Applicant, after making the necessary corrections, again filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1065 rendered by the Tribunal on 26 July 2002. The Application contained pleas which read, in part, as follows:

"II. Pleas:

The Applicant is requesting the Administrative Tribunal to reconsider its Judgement No. 1065 which was rejected and order the United Nations to comply with [the Staff Regulations and Rules] and pay damages equivalent to **3 years' salary plus costs** due to (i) opposite and contradictory decisions and long delays by the Administration from 1995 to 1999 and for not having complied *and still not complying* with its staff rules 106.2 (a) (viii), 109.4 under regulation 9.3 & annex III, 110.4 and articles 11.1 (c), 11.2, 11.3, 12.2(d) of Appendix D and (ii) for not having given to [the] Applicant *the guarantee of a regular*

procedure as referred to in Chapter X. The Applicant respectfully also draws the attention of the Administrative Tribunal to item 7 below "*new fact*" and requests that Appendix D, in particular articles 11.1 (c) and 11.2 (d) be correctly and properly applied.

7. **New fact:** Violation of Article 11.1 (c) ... as [the] Applicant is:
- (a) not earning the same amount of the final annual pensionable remuneration plus dependency allowance as when he was in office - which should have been granted more so in view of the high percentage of his disability;
 - (b) his *dependency allowance* (for his mother) since [the] Applicant's retirement has fallen into oblivion as he is certainly not receiving dependency allowance equivalent to US \$ 300.- and
 - (c) the *10% under article 11.2 (d)* cannot be allowed to stand as such a *small percentage* cannot possibly be applicable in a case of a 72% disability and
 - (d) whatever the amount granted under this heading, it should obviously increase in the same proportion as [the] Applicant's pension and/or cost of living increase."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2003 and periodically thereafter until 31 January 2004;

Whereas the Respondent filed his Answer on 30 January 2004;

Whereas the Applicant filed Written Observations on 25 May 2004;

Whereas the facts in the case were set forth in Judgement No. 1065.

Whereas the Applicant's principal contention is:

In view of the additional information and explanation provided by the Applicant, the Tribunal should reconsider his case.

Whereas the Respondent's principal contentions are:

1. The Applicant's request for revision of judgement is without merit.
2. The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1065 was rendered.

3. The Applicant is seeking to introduce a new claim based on a decision from May 2002 which matter was not under consideration in Judgement No. 1065. The appropriate course of action is for the Applicant to initiate a new appeals process.

The Tribunal, having deliberated from 27 October to 24 November 2004, now pronounces the following Judgement:

I. This is the Applicant's fourth Application to the Tribunal. In it, he requests revision of Judgement No. 1065, *Massi* (2002), rendered in response to his first three Applications, which were consolidated.

II. The Tribunal recalls that the Applicant was seriously injured during an operation to remove demonstrators from the grounds of the United Nations and remained disabled for life. Upon expiration of his sick leave, the Applicant's fixed-term appointment was not renewed. The Tribunal, in the Judgement whose revision is requested, rejected all pleas submitted by the Applicant in his three prior Applications. Firstly, the Tribunal decided that the Secretary-General had not violated the Applicant's rights by failing to renew his fixed-term contract because, barring any special circumstances, a staff member is not entitled to renewal of his contract, pursuant to staff rule 104.12 (b) (ii). In the Applicant's case, no such circumstance existed. Secondly, the Tribunal found that the Administration had correctly calculated, pursuant to article 11.3 of Appendix D, on the recommendation of the Advisory Board on Compensation Claims (ABCC) approved by the Secretary-General, an indemnity equivalent to a 72 per cent loss of function of the whole person as a result of the incident cited above. In addition, the Applicant had obtained the maximum authorized number of sick leave days. Lastly, with regard to the third Application, the Tribunal found that the Applicant was wrong to contest the recovery of a sum paid to him as a disability benefit that had been awarded to him as a result of an arithmetical error in his favour, and that he should therefore refund the amount. Furthermore, he had no right to any compensation for what he considered to be the long delay in deciding his case, which was justified by the complexity of the issues raised.

Against that background, the Applicant requests revision of judgement. On the one hand, he submits a number of facts that were before the Tribunal in the earlier cases; on the other hand, he claims that there is a new fact, i.e., the decision taken by the ABCC on 20 May 2002, adopted at its 408th meeting.

III. The Tribunal again recalls the very restrictive conditions under which an Application for revision can succeed. Article 12 of the Statute of the Tribunal provides that:

"The Secretary-General or the Applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The Application must be made within 30 days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the Application of any of the parties."

As the Tribunal stated in Judgement No. 1014, *Al Ansari* (2001),

"By virtue of article 12 of the Statute, for an Application for a revision of a judgement to be admissible, the Applicant must establish four things:

- (1) The existence of a fact;
- (2) That the 'fact' was unknown to the Tribunal and the party claiming revision when the judgement was given;
- (3) That such ignorance was not due to negligence; and,
- (4) That the 'fact' is of such a nature as to be a decisive factor in the case." (para. VII. See also Judgements No. 357, *Sforza-Chrzanowski* (1985); No. 556, *Coulibaly* (1992); No. 669, *Khan* (1994); No. 672, *Burtis* (1994); No. 896, *Baccouche* (1998); and No. 1055, *Al-Jassani* (2002).)

The Tribunal must first determine whether this case meets the requirements for a revision of judgement.

IV. The Tribunal must first of all state, once again, that a request for revision cannot be a means to obtain from a new judgement what was not obtained from the first one. As previously stated in Judgement No. 894, *Mansour* (1998),

"the Tribunal's powers of revision of a judgement are strictly limited and may be exercised only upon compliance with the conditions set forth in ... No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation" (para. II).

With respect to the facts invoked by the Applicant, the Tribunal regrets having been forced yet again to review a statement of known (old) facts that had been sufficiently taken into consideration in Judgement No. 1065. Furthermore, the Tribunal notes a lack of seriousness in the submission of old annexes that had been studied in connection with earlier cases: annexes 1 to 22, which the Applicant transmitted to the Tribunal, are all dated before the end of 1999. The date of the Judgement is 2002: all those documents were therefore known and thus completely irrelevant in terms of new facts.

What then is the status of the ABCC recommendation of 20 May 2002? *A priori* one could say that the ABCC recommendation, upon which the Applicant bases his claim, is a *fact*. Nevertheless, the information provided in the case shows clearly that *the fact was not unknown to the Tribunal* or to the party requesting revision. That decision was taken before 26 July 2002, when the Judgement was rendered, and was transmitted to the Applicant on 27 September of the same year and received by him, according to his statements, on 29 November, although it is true that the decision was not challenged in the three initial Applications, as it came later. Furthermore, the Applicant himself recognizes that the recommendation was transmitted directly to the Tribunal on 10 June 2002. It therefore cannot be a new fact unknown to the Tribunal.

It is true that on 1 July 2002 the Applicant sent his comments on the document to the Tribunal in writing. In that letter he refers to

"this ... decision (ABCC's 408th recommendations) together with a worksheet of the calculation under article 11.2 (d) which I do not agree with. This calculation takes into account only a 10 [per cent] award and only a 72 [per cent] thereof for a permanent (partial) disability ... There is no reason why this calculation should be allowed to stand. Furthermore, no medical board [as] requested by me on 19 December 1996 has yet been convened to determine the degree of disability (i.e. whether partial or total)."

Indeed, this letter, which has been submitted to the Tribunal in this Application, had not been submitted before the first Judgement, as is stated by the Applicant in his Application:

"On 11 July 2002, the Executive Secretary of the Administrative Tribunal stated that Applicant's communication of 1 July 2002 [was] irreceivable as it was not submitted within the time frame of five working days counted from the date of the commencement of the session".

Might this document constitute a new fact that would allow the initiation of proceedings for revision? The answer is clearly in the negative. In fact, that the Tribunal knew of the ABCC recommendation of 20 May 2002 prior to its rendering of Judgement No. 1065 is not contested, even if the record of the case did not contain the Applicant's criticisms of the recommendation. The Tribunal does not view those comments as a new fact. The decisive factor is the Tribunal's prior knowledge of the recommendation by the Administration concerning the Applicant's situation, rather than its lack of knowledge of the Applicant's comments thereon, which were submitted after the expiration of the time limit.

The Tribunal must also reply to the Respondent's argument that the Applicant, in contesting the ABCC recommendation, is seeking to submit a new Application. In his own words:

"the Respondent respectfully submits that the Applicant is seeking to introduce a *new claim* and not a 'new fact'. Therefore, the Respondent respectfully submits that if the Applicant wishes to contest the calculation of annual compensation payable pursuant to Article 11.2 (d) of Appendix D, he should initiate a new appeals process, instead of seeking revision of a Judgement." (Original emphasis.)

The Tribunal does not agree with this analysis and does not believe that it is sound practice to consider the request as a new Application.

V. What then, is the Applicant alleging? The Applicant contests the manner in which the administration calculated his compensation for disability and requests that it should be correctly calculated in accordance with Appendix D, in particular articles 11.1 (c) and 11.2 (d) thereof. It is true that the Applicant seeks to reopen the question of the recognized percentage of his disability, the validity of which was confirmed by the Tribunal, by challenging the methods used in calculating the amount of compensation. In reality, the Applicant is seeking more compensation than he is receiving and, being dissatisfied, seeks to maintain that it is not in conformity with the rules. According to his Application,

"[a]pplication and calculation of article 11.2 (d) of Appendix D, more so since the dollar has now declined and his pension is approximately 50 per cent less than he was earning in 1999 - date of separation - his pension now is certainly not in conformity with that article".

However, given that the Tribunal has already adopted a position as to the validity of the compensation owed to the Applicant, there really is no new claim before it.

VI. Procedures exist to guarantee due process and justice, but they must not be diverted from their purpose. Had the Administration's decision not been known to the Tribunal, and therefore open to consideration as a new fact, this Tribunal might have been able to take it up with a view to revising or interpreting its Judgement, inasmuch as the ABCC recommendation of 20 May 2002 is only one of the means of implementing the decisions adopted by the Tribunal in Judgement No. 1065 and it would be contrary to the proper administration of justice to request that new litigation should be initiated, given the time limits involved in this type of procedure.

VII. To allow the Applicant to feel that justice has been done and to prevent the dispute from being drawn out indefinitely - the accident having happened in 1995 - the Tribunal will not simply state that there is no new fact, which would put an end to the Applicant's claims without it being necessary to enter into the merits of the case. The Tribunal wishes further to state that the recommendation - which is not a new fact - is in absolute conformity with Judgement No. 1065 and that it constitutes a correct application of the texts invoked. The Tribunal hereby only confirms Judgement No. 1065. In fact, after leaving the United Nations upon the non-renewal of his contract, the Applicant received both annual compensation from the ABCC and a disability benefit, as is stated in Judgement No. 1065. He is, of course, not allowed to draw both amounts concurrently, and the relevant documentation states that in accordance with the provisions of Annex III of the Staff Regulations and Rules, the amount to be paid to him under Appendix D may be reduced because of the disability benefit paid by the Pension Fund, as was also stated in the aforementioned Judgement. When articles 11.1 (c) and 11.2 (d) of Appendix D are combined, the Applicant is entitled to 72 per cent of two thirds of his final pensionable remuneration as compensation for his disability. However, article 4 of Appendix D provides for "Relation to benefits under the United Nations Joint Staff Pension Fund", and articles 4.1 (a) and (b) are relevant here:

"Article 4.1.

(a) Subject to the provisions of paragraph (b) of this article, there shall be deducted from any compensation payable under articles 10.2, 11.1 (c)

and 11.2 (d) of these rules the amount of all benefits paid to the staff member or to persons entitled through him under the Regulations of the Joint Staff Pension Fund, other than any part of such benefits deriving solely from voluntary contributions paid by the staff member himself under article XVIII of those regulations, provided that such benefits have become payable as a result of the same death, injury or illness which gave rise to the entitlement to compensation under these rules;

(b) Deductions made under paragraph (a) above shall in no case have the effect of reducing the compensation otherwise payable under articles 10.2, 11.1 (c) and 11.2 (d) to less than 10 per cent thereof, provided always that the total annual amount payable both under these articles and under the Regulations of the Joint Staff Pension Fund does not exceed the final pensionable remuneration of the staff member plus the annual dependency allowances to which he was entitled at the date of the cessation of his employment."

It is therefore clear that the rules establish a higher and a lower limit to the combination of the compensation for disability under Appendix D and the disability benefit paid by the Pension Fund. The total amount payable may not be more than the staff member's final pensionable remuneration, and it may not be less than 10 per cent of the amount to which he would be entitled under Appendix D. The Tribunal cannot but affirm that all calculations were correctly made, in accordance with those rules, by the ABCC in its recommendation of 20 May 2002.

VIII. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Brigitte **Stern**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

**Administrative Tribunal**

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31 January 2005

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1199

Case No. 1156: OBINY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 13 June 2003, Philip Ogutu Obiny, a former staff member of the United Nations, filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1045 rendered by the Tribunal on 23 July 2002;

Whereas in his Application the Applicant requested the Tribunal, inter alia [to order]:

1. ... [R]escission of the contested administrative decision and cause the Applicant to be paid compensation for the injury suffered as a result of [the] arbitrary termination and victimisation due to his role as chairman of Staff Association.
2. Reinstatement of [the A]pplicant in United Nations service from 1st January 1997 with all benefits until date of reinstatement ...
- ...
4. ... [R]emoval of all ... documents which were fabricated and confidential from the [A]pplicant's personal file ...
5. ... [R]evision of content and substance of [J]udgement number 1045, which is flawed by errors of omission."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 8 December 2003;

Whereas the Respondent filed his Answer on 5 November 2003;

Whereas the Applicant filed Written Observations on 8 December 2003;

Whereas on 28 October 2004, the Applicant submitted an additional communication;

Whereas the facts in the case were set forth in Judgement No. 1045.

Whereas the Applicant's principal contentions are:

1. The amount paid by the Respondent, in accordance with the JAB's recommendation of nine month's net base salary, was paid at the rate in effect at the time of payment, i.e., November 2000. The compensation of twelve months' net base pay at the rate in effect at the time of separation (November 1996), which was awarded by the Tribunal in Judgement No. 1045, would be about half the compensation that was already paid by the Secretary-General. The intention of the Tribunal cannot be read to mean negative compensation.

2. The Tribunal erred in not ordering the rescission of the contested decision. In failing to order the Applicant's reinstatement, the Tribunal has sustained an administrative decision and action which do not have a basis.

3. Article 12 of the Tribunal's Statute recognizes that errors of omission are serious enough to cause effect to revisions of its Judgements. Omissions are not limited to missing typographic, clause or paragraph in judgements but extend to issues and policies that may have been overlooked or disregarded.

Whereas the Respondent's principal contention is:

The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1045 was rendered, and, accordingly, his request for a revision of the Judgement is without merit.

The Tribunal, having deliberated from 4 to 24 November 2004, now pronounces the following Judgement:

1. The Applicant is seeking revision of Judgement No. 1045, *Obiny*, of 23 July 2002. He requests the Tribunal to order the Respondent to reinstate him in service and to pay him compensation for "the injury suffered as a result of [the] arbitrary

termination and victimization due to his role as chairman of [the] Staff Association". The Applicant claims that the content and substance of Judgement 1045 is "flawed by errors of omission" and should therefore be revised.

II. Article 12 of the Statute stipulates the circumstances under which a judgement may be revised, as follows:

"The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The Application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

The first circumstance which is recognized as one warranting the revision of a judgement is the discovery of a new fact by one of the parties. This is qualified by the requirements that the newly discovered fact must be one that is sufficiently important so as to have affected the Tribunal's decision and that it was unknown to the discovering party and to the Tribunal at the time of rendering the judgement.

The second circumstance for revision of a judgement is when the Tribunal recognizes that a mistake had occurred in its judgement. This includes clerical or arithmetic mistakes as well as accidental slip or omission. In Judgement No. 896 *Baccouche* (1998) the Tribunal held that

"Applications for correction of clerical mistakes have no other purpose than to amend such mistakes in the text of a judgement. In fact, such mistakes may be typographical or arithmetical (affecting, for example, the amount of compensation) or they may result from an accidental slip or omission. *The point at issue always relates to a defect in the drafting of the judgement and never to its substance*, i.e. to possible unawareness on the part of the Tribunal of facts or applicable rules." (Emphasis added.)

III. In Judgement No. 1045, the Tribunal ruled that the Respondent's decision not to extend the Applicant's fixed-term contract was tainted by arbitrariness and lack of due process and that the Applicant was victimized because of his involvement with the UNDP Staff Association. Accordingly, the Tribunal ordered the Respondent to pay the Applicant "compensation of twelve months' net base salary at the rate in effect on the date of his separation from service, less the amount already paid by the Secretary-

General". In his request for revision, the Applicant points to the fact that the compensation as ordered by the Tribunal, because it was to be paid "at the rate in effect on the date of his separation from service", ultimately leads to a negative compensation. In numerical values, the amount to be paid to him in accordance with the Tribunal's order was Ksh. 717,369.96, whereas the amount already paid to him by the Secretary-General in November 2000, based on the recommendation of the JAB, was Ksh. 902,278.00, yielding a negative compensation of Ksh. 184,908.04.

IV. It is clear that the Tribunal's intention in Judgement 1045 cannot be read to mean negative compensation. The Tribunal had increased the compensation to be awarded to the Applicant from nine to twelve months' net base salary. However, it was not aware of the depreciation in the local currency or of the increase in salaries, which had taken place between the time of the Applicant's separation from service and the time of the payment of compensation by the Respondent. In this regard, the Tribunal has previously stated in its Judgement No. 972: *Abdulhadi*, (2000), that:

"the operative part of the judgement relating to the value of the salary at the time of separation cannot be interpreted in a manner likely to cause financial loss to the Applicant, since this would be a contradiction in terms."

Likewise in the Applicant's case, the Tribunal's order should not be construed as intended to cause the Applicant financial loss. The Tribunal, following *Bacconche* (*ibid.*), views the Order in Judgement 1045 as one that includes an accidental mistake in the drafting which should be corrected. In the Tribunal's view, the appropriate redress in this case would be to award the Applicant the additional three months' net base salary, which the Tribunal originally intended to grant him as compensation, payable at the same rate as the compensation already paid to him by the Secretary-General in November 2000.

V. The Applicant raises additional claims in his Application. However, the Tribunal finds that as regards those other claims, he did not meet the criteria of article 12 but rather, the Applicant attempted to re-open issues already decided upon by the Tribunal in Judgement No. 1045 and which are therefore *res judicata*. The Tribunal refers to article 11, sub-paragraph 2 of its Statute which states that "[s]ubject to the provisions of article 12, the judgements of the Tribunal shall be final and without appeal". In its Judgement No. 1055, *Al-Jassani* (2002) the Tribunal stated:

"VII. 'No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation.' (Judgement No. 894, *Mansour* (1998), para. II.) Yet the Applications in these cases are in reality a restatement of the claims asserted by the Applicant. No one should believe that a mere restatement of claims, even though made in new language and with changed emphasis, can be a basis for the revision of a Judgement made by the Tribunal. As stated in [(Judgement No. 556, *Coulibaly* (1992))], a revision is not a means of reopening issues that have been settled definitively and which are thus *res judicata*. See also *Baccouche*, [(*ibid.*)] in which the Tribunal explained that an application for a revision must not be confused with an appeal, since the Tribunal's judgements are final and not subject to appeal."

VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation equivalent to three months' net base salary, to be paid at the same rate as the compensation paid to him in November 2000; and,
2. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Omer Yousif Bireedo
Member

Spyridon Flogaitis
Member

New York, 24 November 2004

Maritza Struyvenberg
Executive Secretary

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1200

Cases No.	1182: FAYACHE	Against:	The Secretary-General
	1186: FAYACHE		of the United Nations
	1187: FAYACHE		
	1188: FAYACHE		
	1190: FAYACHE		
	1191: FAYACHE		

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS.

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas at the request of Mohamed Larbi Fayache, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 May 2003 the time limit for the filing of an application with the Tribunal;

Whereas, on 12 May 2003, the Applicant filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 June 2003, the Applicant, after making the necessary corrections, again filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1086 rendered by the Tribunal on 25 November 2002. The Application contained pleas which read, in part, as follows:

"PLEAS

The Tribunal is respectfully requested to find and rule that:

1. AT/DEC/1086 (which purports to be the Tribunal's [Judgement] on cases No. 1182, 1186, 1187, 1188, 1190 and 1191), and which disregarded *dozens* of [United Nations Administrative Tribunal (UNAT)] and [Administrative Tribunal of the International Labour Organization] precedents, rules and regulations, not to mention three [General Assembly] resolutions, was the exclusive work of [the Executive Secretary of UNAT] and was drafted in collusion with [the] Deputy Director[, General Legal Division], the [Office of Human Resources Management] Rules and Regulations Section and the *Acting* Secretary of the Geneva [Joint Appeals Board (JAB)].

2. Furthermore, [the Executive Secretary of UNAT's] AT/DEC/1086 constitutes a case of denial of justice ...

4. The Tribunal's Executive Secretary ... colluded with her colleagues the *Acting* Secretary of the Geneva JAB and [the Deputy Director, General Legal Division,] (who was involved in my cases since June 1999) in order to have the *Acting* Secretary of the Geneva JAB issue all his reports the same day, which enabled the Respondent to issue a single answer, and the Executive Secretary to draft a single judgment which drowned out eighty out of my eighty-six pleas.

5. [The Executive Secretary of UNAT's] AT/DEC/1086 arbitrarily and illegally joined on as early as 4 April 2002 six different cases, filed in the course of two years (including three for which the documentation was not sufficiently complete since I had not sent my written observations), when she informed me that all my cases would be considered jointly in July 2002.

...

And consequently,

...

16. Alternatively, issue six new and different judgments on my cases which would consider all my pleas instead of only one for each case, by members of the Tribunal other than the three who signed AT/DEC/1086.

17. Hold a special plenary session in accordance with article 5.2 of the Rules of the Tribunal ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 November 2003;

Whereas the Respondent filed his Answer on 28 November 2003;

Whereas, on 26 February 2004, the Applicant filed Written Observations amending his pleas as follows:

"Conclusion and pleas:

The Tribunal is respectfully requested to:

1. Order the Respondent to submit a factually correct and honest Answer and reply to *all my pleas* without distorting any fact, as he is required by all legal deontological codes.
2. Find that the adoption of [General Assembly resolution 57/307, "Administration of Justice in the Secretariat", of 15 April 2003] (of which neither I nor the UNAT was aware at the time of the judgment) did introduce a fact of a decisive nature, which was unknown to the Tribunal and to me at the time [Judgement] No. 1086 was rendered.

...

Whereas the Applicant submitted additional Observations on 6 July 2004;

Whereas the facts in the case were set forth in Judgement No. 1086.

Whereas the Applicant's principal contention is:

The Tribunal should consider the six original Applications individually and render six new and different judgements considering all the pleas. The Executive Secretary and the members of the Tribunal who signed AT/DEC/1086 should not be involved in the rendering of these new judgements.

Whereas the Respondent's principal contention is:

The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1086 was rendered, and, accordingly, his request for a revision of that Judgement is without merit.

The Tribunal, having deliberated from 26 October to 24 November 2004, now pronounces the following Judgement:

I. In 2000 and 2001, the Applicant submitted six Applications to the Tribunal: Cases No. 1182; No. 1186; No. 1187; No. 1188; No. 1190; and, No. 1191. On 25 November 2002, the Tribunal rendered one Judgement (No. 1086, *Fayache* (2002)), for all six cases. In that Judgement, the Tribunal specifically addressed various claims of the Applicant and then rejected all other pleas.

In the present Application, the Applicant contends that the Tribunal did not understand his maltreatment by the Administration; engages in personal attacks against various officials of the Organization; and, substantially reiterates the pleas contained in his original Applications.

II. In its recent Judgement No. 1164, *Al-Ansari et al.* (2004), the Tribunal produced what may be considered a seminal Judgement on its powers of revision and interpretation. It considers it appropriate to quote a substantial part of that Judgement herewith:

“The jurisdiction of the Tribunal to revisit cases in which Judgement has been rendered is by and large to be found in article 12 of the Tribunal’s Statute, which reads as follows:

‘The Secretary-General or the Applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties.’

The Tribunal applies article 12 rigorously: in Judgement No. 303, *Panis* (1983), it held that

‘Applications for revision of a judgement delivered by the Tribunal must be considered in the light of the standards imposed by article 12 of the Tribunal’s Statute. ... The standards contained in article 12 are ... relatively strict and lay a substantial burden upon a party who requests revision.’

Recently, in Judgement No. 1120, *Kamoun* (2003), the Tribunal stated:

‘In accordance with the Statute and case law, in order to be able to apply for revision of a judgement it is necessary to satisfy certain formal and substantive conditions. As regards formal conditions, article 12 sets a time limit for filing the application. As regards substantive conditions, in order for an application to be admissible the Applicant must on the one hand, plead discovery of a new fact, that is to say one that was not known at the time the judgement was given, and, on the other, the new fact must be of such a nature as to be able to influence the outcome of the dispute as reflected in the judgement.’

Additionally, in accordance with both the advisory opinion of the International Court of Justice of 13 July 1954 and its own jurisprudence, the Tribunal will consider applications for interpretation of judgement, where there is dispute as to the meaning or scope of the judgement. See Judgement No. 61, *Crawford et al.* (1955).

From what is stated above, it can be seen that the Tribunal has no jurisdiction to re-open cases in which judgement has been rendered based on mere bald assertions such as those made in these cases that the original Judgements were works of incompetence and were wrong. See Judgement No. 896, *Baccouche* (1998), in which the Tribunal explained that an application for revision must

not be confused with an appeal, since the Tribunal's judgements are final and not subject to appeal."

III. In the instant case, the Tribunal finds that the Application for revision of Judgement contains no new fact of the sort contemplated by article 12. Indeed, as the Respondent correctly points out, the Application does not even purport to rely upon article 12. It is, in reality, a restatement of the claims originally asserted by the Applicant, embellished with unwarranted attacks and conspiracy theories. This simply cannot provide a basis for revision of Judgement, which is not a means of reopening issues that have been settled definitively and which are thus *res judicata*. (See Judgment No. 556, *Coulibaly* (1992).) In this regard, the Tribunal recalls Judgment No. 894, *Mansour* (1998), in which it stated that "[n]o party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation".

IV. The Tribunal now turns its attention to the outrageous and improper allegations made against the Tribunal and its secretariat in the present Application. The Tribunal finds that the Applicant has demonstrably abused the process of administration of justice. As it has no power to fine the Applicant, or otherwise hold him in contempt, it wishes to state for the record that it can and will impose costs against the Applicant should further frivolous or abusive Applications be filed with the Tribunal. This does not contradict the position taken by the Tribunal in its Statement of Policy on costs, adopted on 18 December 1950 (A/CN.5/R.2), which makes no reference to awarding costs against an Applicant.

In this regard, the Tribunal wishes to take judicial notice of Judgement No. 1884, *In re Vollerling* (No. 15) (1999), rendered by the Administrative Tribunal of the International Labor Organization (ILOAT):

"The Tribunal has never heretofore imposed a costs penalty upon a complainant. However, it asserts unequivocally that it possesses the inherent power to do so as part of the necessary power to control its own process. Clearly, such power must be exercised with the greatest care and only in the most exceptional situations since it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of costs. That said, however, there is another side to the coin: frivolous, vexatious and repeated complaints to the Tribunal absorb the latter's resources and impede its ability to deal expeditiously and fully with the many meritorious complaints which come before it. They are also, of course, costly and time-wasting for the defendant organisation."

The wisdom of the ILOAT in its cited Judgement is fully recognized by this Tribunal, which will have no hesitation in acting accordingly, should the occasion arise.

V. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary



Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1201

Case No. 1185: BERG

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Dayendra Sena Wijewardane;

Whereas, on 28 July 2003, Njal Berg, a staff member of the United Nations, filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1090, rendered by the Tribunal on 25 November 2002;

Whereas in his Application the Applicant requested the Tribunal, *inter alia*:

- “9. ... [T]he Applicant most respectfully requests the Administrative Tribunal *to order*:
- (a) that the **written** censure dated 11 July 2000 be withdrawn.
 - (b) that all and any demotions recommended by the [Joint Disciplinary Committee (JDC)] or the Tribunal be revoked and that the Applicant be reinstated to FS-4 level retrospectively from the date of the original demotion.
 - (c) that the Applicant be awarded as costs the sum of \$10,000 in legal fees plus \$1,000 in expenses.
10. Further and in the alternative, to order that the Applicant be paid the sum of two years' net base pay in compensation.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 19 November 2003;

Whereas the Respondent filed his Answer on 28 October 2003;

Whereas the Applicant filed Written Observations on 18 February 2004;

Whereas the facts in the case were set forth in Judgement No. 1090.

Whereas the Applicant's principal contentions are:

1. The Applicant has submitted new facts of such a nature as to be a decisive factor, which facts were unknown to the Tribunal and to the Applicant when Judgement No. 1090 was rendered.

2. The findings of the JDC were incorrect, both as to the interpretation of the facts and of the law. The disciplinary process violated the Applicant's rights of due process and resulted in a disproportionate penalty.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1090 was rendered.

2. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 26 October to 24 November 2004, now pronounces the following Judgement:

1. The Applicant seeks the revision of Judgment No. 1090, which was rendered by the Tribunal on 25 November 2002 and which was the final step in the proceedings that arose out of an accident which took place on 8 November 1998, when the Applicant lost control of his private car whilst driving it in the United Nations Protected Area (UNPA) in Nicosia, Cyprus.

The allegation against the Applicant was one of misconduct in driving dangerously at high speed under the influence of alcohol and refusing to stop his vehicle when requested to do so by the United Nations Military Police (UNMP). The Applicant denied these allegations and the case was brought before an *ad hoc* JDC which, having considered the evidence, found that the Applicant did not meet the standards of conduct expected of international civil servants. The *ad hoc* JDC consequently recommended that disciplinary measures be imposed on the Applicant.

which recommendation the Secretary-General accepted. In his original Application before the Tribunal, the Applicant challenged the findings of the *ad hoc* JDC as well as the disproportionate penalty imposed. In its Judgement, the Tribunal determined that although disciplinary measures were justified, the measures imposed had been disproportionate.

II. The Applicant now seeks to introduce a supplementary statement by a witness who had already made a statement to the UNMP, stating that the initial statement had not given "a particularly full account of [his] observations". Additionally, the Applicant seeks to introduce as evidence a survey of the traffic in the UNPA, conducted some six months after the Judgment in this case was rendered and more than five years after the incident in question took place. According to the Applicant, this survey demonstrates the wide-spread use of the UNPA by civilian vehicles and had this evidence been available to the Tribunal when it deliberated his case, the conclusions reached would have been different.

III. Article 12 of the Tribunal's Statute provides that the Applicant may apply to the Tribunal

"for a revision of a judgment on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence ..."

The Tribunal has repeatedly held that these provisions in the Statute limit the scope of an application for revision and do not enable a party to reopen issues which have been adjudicated. (See, for example, Judgement No. 1055, *Al-Jassani* (2002).)

The Applicant had the opportunity to produce any and all evidence in support of his case during the proceedings before the *ad hoc* JDC, or at the latest, to present it to the Tribunal when his original case was considered. It is very clear to the Tribunal that the present Application for revision does not in any way subscribe to the requirements of the Statute. What the Applicant is seeking to do in this instance is to obtain another opportunity to supplement evidence in support of his case on issues which had already been decided by the *ad hoc* JDC and the Tribunal. There was no limitation imposed on the actions which the Applicant might have undertaken to strengthen his case, provided that he did so at the appropriate juncture, *i.e.*, present it to the *ad hoc* JDC. In fact, in this request for revision, the Applicant indicates that he and his legal advisors considered that the evidence presented, on at least one issue, had

sufficiently placed the weight of evidence in the Applicant's favour. Only when Judgement No. 1090 was issued did they realize that this was not so, thus prompting this attempt to re-open the same issue with the present request. This is not what article 12 provides for.

Furthermore, if what the Applicant is claiming to advance as a "discovery of new facts" was assumed to be so, which it is not, it would be quite unrealistic to characterize these facts as being "of such a nature as to be a decisive factor". In the Tribunal's view, what the Applicant is seeking is "another bite at the cherry", another chance to litigate the same issues which have been settled in the previous litigation. The jurisprudence of the Tribunal is clear that he cannot do this, as stated in Judgement No. 503, *Noble* (1991):

"This request seeks to relitigate factual issues involved in the proceeding which led to that judgment and which could and should have been raised by the Applicant in that proceeding ... It is plainly frivolous for the Applicant to attempt to relitigate factual issues in the guise of seeking an interpretation of a Tribunal judgement."

This principle also applies when the case at hand is one for a revision of judgement.

IV. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Brigitte Stern
Vice-President, presiding

Jacqueline R. Scott
Member

Dayendra Sena Wijewardane
Member

New York, 24 November 2004

Maritza Struyvenberg
Executive Secretary



Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1202

Case No. 1189: KHADER

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees in
the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President;
Ms. Jacqueline R. Scott;

Whereas, on 4 July 2003, Ahmed Khader, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1088, rendered by the Tribunal on 25 November 2002;

Whereas the Application contained pleas which read, in relevant part, as follows:

"I. PLEAS

Applicant prays [that] the Tribunal ... :

- a. Abrogat[e] the foregoing Judgement;
- b. [Consider the] pleas as set out in the original Application."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 28 February 2004 and once thereafter until 31 March;

Whereas the Respondent filed his Answer on 9 March 2004;

Whereas the facts in the case were set forth in Judgement No. 1088;

Whereas the Applicant's principal contentions are:

1. The contested Judgement is inconsistent with common law and sound judgement and overlooks entirely the Applicant's observations dated 21 October 2002 despite their decisiveness in the case.

2. Despite the Applicant's requests for production of certain documents, the Respondent has only released documents on a selective basis.

Whereas the Respondent's principal contention is:

Bearing in mind the standards contained in article 12 of the Tribunal's Statute, the present Application provides no basis upon which Judgement No. 1088 should be revised.

The Tribunal, having deliberated from 27 October to 24 November 2004, now pronounces the following Judgement:

I. The Applicant has presented his case as a request for revision of a Judgement rendered by the Tribunal, namely Judgement No. 1088.

II. A revision case, basically, hinges upon the existence of a "new" fact, i.e., one that was known neither to the party claiming revision nor to the Tribunal at the time the judgement was pronounced. The often cited article 12 of the Tribunal's Statute sets forth the circumstances under which a judgement may be revised, and all those circumstances relate to a "new" fact. Thus, a "new" fact is an inescapable prerequisite for a revision case to succeed.

III. The Applicant, however, has singularly failed to allege or to establish any new fact, let alone one that could be said to be potentially decisive. He wants the judgement in question to be abrogated because of a number of alleged reasons, none of

them being that there existed a fact unknown to the Applicant or to the Tribunal when the Judgement was rendered and of such a nature that, had it been known at that time, would have been a decisive factor for the Tribunal to change its Judgement.

IV. The Application is, therefore, rejected in its entirety.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary